

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION DHAKA
(Criminal Miscellaneous Jurisdiction)**

The date 24.09.2020.



Criminal Misc Case No. 51937 of 2019 (Arising out of Sessions Case No.2150 of 2017 arising out of Sadar C.R. Case No.1596 of 2016, now pending before the learned Metropolitan Joint Sessions Judge, 1st Court, Sylhet).

Mawalana Md. Enamul Haque, son of late Mawalana Zafar House No. 3/5, Block-A, Bandhan R/A, Akhalia, Police Station-Jalalabad, District: Sylhet. Business Address- City Super Market (2nd floor), Bondar Bazar, Police Station- Kotwali, District- Sylhet.

.....Accused-Petitioner.

=VERSUS=

1. Mohammad Abdul Shahid son of late Hazi Md. Jamsher Ali, House No. 104, Nabapusha R/A, Jatharpur, Police Station-Kotwali, District- Sylhet, At Present-157, Radipohe Lane, Weumouth, Dorset, DT4 OTF U.K. Represented by his attorney Md. Azizur Haque, son of Md. Torab Ali of Village-Haidorpur, Police Station-Chatak, District-Sunamgonj.

...Complainant-Opposite Party.

2. The State.

.....Opposite Party.

With

Criminal Misc Case No. 51939 of 2019 (Arising out of Sessions Case No.2147 of 2017 arising out of Sadar C.R. Case No.351 of 2017, now pending before the learned Metropolitan Joint Sessions Judge, 1st Court, Sylhet).

Mawalana Md. Enamul Haque, son of late Mawalana Zafar City Super Market (2nd floor), Bondar Bazar, Police Station-Kotwali, District- Sylhet.

.....Accused-Petitioner.
1. Md. Azad Ali, son of Alhaj late Safat Ali 96/A, Housing Estate, Ambarkhana, Police Station: Airport (Sadar), District: Sylhet Represented by his attorney Md. Azizur Haque, son of Md. Torab Ali of Village-Haidorpur, Police Station-Chatak, District-Sunamgonj, At Present-96 A, Housing Estate, Ambarkhana, Police Station: Airoport (Sadar), Disrict: Sylhet.

...Complainant-Opposite Party.

2. The State.

.....Opposite Party.

Present

Mr. Justice Md. Habibul Gani

And

Mr. Justice Md. Riaz Uddin Khan

Criminal Miscellaneous Case No. 51937 of 2019

With

Criminal Miscellaneous Case No. 51939 of 2019

Mawlana Md. Enamul Haque

..... Accused- Petitioner

Versus

The State and another

..... Opposite Parties

Mr. Mohammad Shahin Mia, Advocate

..... For the Accused-Petitioner

Mr. Muzakkir Hossain, Advocate

.....For the Opposite Party No. 1

Mr. B.M. Abdur Rafell, DAG with

Mr. Md. Ali Haider, AAG

..... For the State

Heard on: 27.02.2020, 20.08.20,27.08.2020

and Judgment on:24.09.2020

Md. Habibul Gani, J.

Facts and issue of the instant Criminal Misc. Case No. 51937

of 2019 and Criminal Miscellaneous Case No. 51939 of 2019 are

identical and as such, those matters have been taken up for hearing

together and disposed by this single judgment.

In Criminal Miscellaneous Case No. 51937 of 2019 Rule was

issued upon an application under section 561A of the Code of

Criminal Procedure, calling upon the opposite parties to show cause

as to why the proceeding of Sessions Case No. 2150 of 2017 arising

out of Sadar C.R. Case No. 1596 of 2016 under section 138 of the Negotiable Instruments Act, 1881, now pending before the court of Metropolitan Joint Sessions Judge, 1st Court, Sylhet should not be quashed and/or pass such other or further order or orders as to this court may seem fit and proper.

At the time of issuance of the Rule all further proceeding of the aforementioned case was stayed for a period of 6 (six) months which was time to time extended.

In Criminal Miscellaneous Case No. 51939 of 2019 Rule was issued upon an application under section 561A of the Code of Criminal Procedure, calling upon the opposite parties to show cause as to why the impugned proceeding in Sessions Case No. 2147 of 2017 arising out of Sadar C.R. Case No. 351 of 2017 under section 138 of the Negotiable Instruments Act, 1881, now pending before the court of Metropolitan Joint Sessions Judge, 1st Court, Sylhet should not be quashed and/or pass such other or further order or orders as to this court may seem fit and proper.

At the issuance of the Rule all further proceeding of the aforementioned case was stayed for a period of 6 (six) months which was time to time extended.

In Criminal Miscellaneous Case No. 51937 of 2019, short facts leading to disposal of the Rule are that one Md. Abdus Shahid filed

C.R Case No. 1596 of 2016 through his attorney Md. Azizul Haque against the present petitioner under section 138 of the Negotiable Instruments Act, 1881 alleging inter-alia that the petitioner and the complainant had land business and out of the said land business the accused petitioner received taka 20,00,000/- (Taka Twenty Lac) from the complainant and in order to re-pay the said money, on 30.08.2016 the accused petitioner issued cheque being number AWCD1 1918465 amounting taka twenty lac in favour of the complainant which the complainant deposited in his bank for a several times and lastly deposited on 06.10.2016 for encashment but the said cheque was dishonored by the bank due to insufficient fund. Thereafter, the complainant issued legal notice on 30.10.2016 through registered post with acknowledge due upon the accused petitioner but the accused petitioner intentionally refused to receive the said legal notice. The accused utterly failed to make the payment of the cheque amount within 30 days and subsequently, the complainant was compelled to file the instant case under section 138 of the Negotiable Instruments Act, 1881 before the Court of the Chief Metropolitan Magistrate, Sylhet.

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 High Court Division, Dhaka.

Learned Magistrate upon receipt of the petition of complaint examined the attorney Md. Azizul Haque under section 200 of the Code of Criminal Procedure and then issued summon upon the

accused petitioner Mawlana Md. Anamul Haque. In due course, the accused petitioner appeared before the court below and obtained bail and in due course, the case was transmitted to the Court of Metropolitan Sessions Judge, Sylhet for trial and subsequently, the same was transmitted for trial to the Metropolitan Joint Sessions Judge, 1st Court, Sylhet. The accused petitioner duly appeared before the Trial Court and in due course, charge was framed under section 138 of the Negotiable Instruments Act, 1881 and PW-1 was examined and then, the accused petitioner came before this court with an application under section 561A of the Code of Criminal Procedure for quashing the proceeding and obtained the present Rule and order of stay.

In Criminal Miscellaneous Case No. 51939 of 2019, the short facts leading to disposal of the Rule are that one Md. Azad Ali as complainant filed Sadar C.R Case No. 351 of 2017 before the Court of Chief Metropolitan Magistrate, Sylhet through his attorney Md. Aziaul Haque against the present petitioner Mawlana Md. Anamul Haque alleging inter-alia that out of a land business the complainant would get taka 20,00,000/- (Twenty lac) from the accused petitioner and in order to discharge his liability issued cheque being Number. AWCD1 1918466 dated 15.12.2016 in favour of the complainant. The complainant deposited the said cheque for encashment twice and

lastly deposited on 27.12.2016 in his bank for encashment of the cheque which was dishonored by the bank due to insufficient fund. Subsequently, the complainant issued legal notice through registered post with acknowledge due on 16.01.2017 but the accused petitioner did not take any step for payment of the cheque amount to the complainant, as such, the complainant filed instant case under section 138 of the Negotiable Instruments Act.

Learned Chief Metropolitan Magistrate, Sylhet, examined the attorney of the complainant under section 200 of the Code of Criminal Procedure and issued summon upon the accused petitioner who in due course, appeared before the court below and obtained bail. Subsequently, the case was transmitted to the court of Metropolitan Joint Sessions Judge, 1st Court, Sylhet for trial who, in due course, framed charge against the accused petitioner under section 138 of the Negotiable Instruments Act, 1881 and subsequently examined the attorney as PW-1. Thereafter, the accused petitioner preferred the present application under section 561A of the Code of Criminal Procedure before the High Court Division and obtained the present Rule and order of stay.

In both the cases Mr. Md. Shain Miah, learned Advocate appearing for the accused petitioner Mawlana Md. Anamul Haque contended that the present two cases had been filed under section 138

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of the Negotiable Instruments Act, 1881 for dishonoring the cheques but the two cases were filed through attorney who is not due holder of the cheque. Learned Advocate submits that in section 9 of the Negotiable Instruments Act, 1881 the holder in due course has been defined and as per said section 9 of the Act the present attorney is not the 'holder in due course' of the cheque as such, the filing of the case by the attorney in a case under section 138 of the Negotiable Instruments Act, 1881, which is the special law, is totally barred by law. Learned Advocate again submits that the present two cases are barred by section 141 of the Negotiable Instruments Act, 1881 as the attorney is neither the party nor 'holder in due course of the cheque'. So, the instant two cases cannot be continued against the present petitioner and the proceedings of the two cases are mere abuse of process of the court and those are liable to be quashed. In support of the submissions, learned Advocate for the petitioner relied upon the case of Md. Nur Hossain-vs-Md. Alamgir Alam reported in 37 BLD AD 202.

Mr. Md. Muzakkir Hossain learned Advocate appearing for the Opposite party No. 1 in both the cases contended that though the present case under section 138 of the Negotiable Instruments Act 1881, which is special law, but there is no bar to file case through attorney. Learned Advocate submits that filing of the case by the

constituted attorney is deemed to filling of the case by the original executant of the power of attorney. The attorney is the representative of the executants of the power of attorney, as such, it deemed that the case has been filed by the original 'Payee' or 'holder in due course' of the cheque. Learned Advocate further submits that there is no bar to file case under section 138 of the Negotiable Instruments Act through attorney and in support of his submission he relied upon the case of Hasibur-vs-Bulger Rahman and others reported in 56 DLR AD P-17 and further relied on the case of Tamijul Haq-vs-Anisul Haq reported in 16 BLD AD P-207. Learned Advocate for the opposite party No. 1, in support of his submission, finally relied on the decision of the Indian Supreme Court in the case of A.C. Narian-vs-the State of Moharasto and another reported in (2015)12 SC case 203. Learned Advocate further contended that the accused petitioner did not come at the earliest opportunity that is, immediate after initiation of the case rather he came before this court after completion of deposition of the PW-1 and in the evidence stage the proceeding cannot be quashed and in support of that submission learned Advocate relied upon the case of Golam Sarwar Hiru-vs-the State and another reported in 13 MLR AD 103.

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We have perused the applications made under section 561A of the Code of Criminal Procedure, petition of complaint and other

relevant papers as well as considered the submissions advanced by the learned Advocates for the respective parties and the decisions referred thereto.

The Rule issued in Criminal Miscellaneous Case No. 51937 of 2019, it appears from the petition of complaint being C.R Case No. 1596 of 2016 that the cheque was issued in the name of a person namely Mr. Md. Abdus Shahid and the petition of complaint was filed through his attorney Mr. Md, Azizul Haque but in the averment of petition of complaint nothing was mentioned in respect of filing of the case through attorney. It further appears that at the time of filing of the case the complainant did not annex the alleged power of attorney and while he was examined under section 200 of the Code of Criminal Procedure the power of attorney was not submitted before the learned Magistrate. While the matter was taken up for hearing by this court and in the midst of the hearing of the matter learned Advocates for both the parties were asked to produce the power of attorney for proper adjudication and accordingly, the photocopy of the power of attorney was filed by the learned Advocate of the complainant opposite party no.1 and after perusal of the said power of attorney, it appears that the power of attorney is a notarized one and that is a general power of attorney executed by the complainant Md. Abdus Shahid in favour of the attorney Mr. Azizul Haque for doing some

sorts of works on his behalf but nothing was mentioned about the alleged cheques or to file case under section 138 of the Negotiable Instruments Act, 1881 for dishonoring of the cheque in question of this case. Moreover, it appears that the power of attorney was executed on 01.12.2016 and the date of the dishonored cheque is on 06.10.2016 but in the said power of attorney nothing was mentioned in respect of filing of case under section 138 of Negotiable Instruments Act, 1881 for the instant dishonored cheque. So we find nothing that the Executant gave any power of authority to the alleged attorney to file case for the dishonored cheque in question of this case.

On the other hand in Criminal Miscellaneous Case No. 51939 of 2019 which arose out of the petition of complaint being CR Case No. 351 of 2017 (S.T. Case No. 2147 of 2017), the attorney filled the case on behalf the complainant annexing the power of attorney and he produced the same at the time of examination under section 200 of the Code of Criminal Procedure and as per direction of this court the complainant opposite party no. 1 filed the photocopy of the said power of attorney. It appears that in the power attorney the cheque number has been clearly mentioned along with other task of the attorney. So, it is clear that in the case being CR Case No. 1596 of 2016 no power of attorney was produced at the time of filing of the complaint case. In other case being CR Case No. 351 of 2017 the

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attorney annexed the power of attorney and filed the same to the Court at the time examination under section 200 of the Code of Criminal Procedure.

Considering the submissions of the learned Advocates for both the parties we are of the view there is no bar to file case under section 138 of the Negotiable Instruments Act, 1881 through power of attorney on behalf of the complainant/ payee or holder in due course but while the cheque issued in the name of a person the power of attorney must be executed by the person who is the payee or holder in due course. Mere taking an authorization letter from the payee or holder of the cheque a case under section 138 of the Negotiable Instruments Act cannot be filed. The decision referred by the learned Advocate for the accused petitioner in respect of filing of the case through authorized person cannot be attracted in this case because in the said case the cheque was issued in the name of a company and the company authorized one administrative officer of the company to file the case without any power of attorney or authorization letter and in that case our Appellate Division interfered with the matter quashing the proceeding as the case was not filed by the proper holder in due course but in the present two cases though the attorney clearly stated that he is the Attorney of the payee and on his behalf he filed the two cases but in the case being CR No. 1596 of 2016 though the

complainant mentioned him as attorney but no power of attorney was produced while he was examined under section 200 of the Code of Criminal Procedure or no power of attorney was filed with the petition of complaint but in other case being CR No. 351 of 2017 the power of attorney was annexed and it was duly executed mentioning the cheque number in the power of attorney. Learned Advocate for the complainant opposite party no. 1 argued that in CR Case No. 1596 of 2016 though nothing was mentioned about the power of attorney and no power of attorney was produced at the time of examination under section 200 of the Code but while the attorney was examined as PW-1 he produced the photocopy of the power of attorney and it was exhibited as Exhibit No. 1 series. We carefully scrutinized the photocopy of the Power of Attorney filed before this court by the learned Advocate for the complainant opposite party no. 1 wherefrom it appears that there is nothing mentioned about present cheque in question for filing the CR Case No. 1596 of 2016 under section 138 of the Negotiable Instruments Act, 1881. So, the lacuna cannot be fulfilled even after exhibiting the power of attorney at the time of deposition because there is no mention of the cheque number in the said power of attorney. So the very initiation of the case is void one and total proceeding is void ab-initio and as such our considered view is that the exhibited photocopy of the power of attorney without

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mentioning the Cheque number the case under section 138 of the Negotiable Instruments Act is absolutely barred under section 141 of the Negotiable Instruments Act, 1881. The learned Magistrate or Court of first instance ought not to accept the petition of complaint or examine the attorney under section 200 of the Code of Criminal Procedure while the case was filed without producing power of attorney.

For better understanding we like to quote the definition of the 'payee' and 'holder in due course' as well as the section 141 of the Negotiable Instruments Act which are as follows;

“Payee”-The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the “payee”.

“Holder in due course”-“Holder in due course” means any person who for consideration becomes the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if payable to order, before it became overdue, without notice that the title of the person from whom he derived his own title was defective.

Explanation-For the purpose of this section the title of a person to a promissory note, bill of exchange or cheque is defective what he is not entitled to receive the amount due thereon by reason of the provisions of section 58.

141. Cognizance of offences-Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898)-

- (a) no Court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque:
- (b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138;
- 1[(c) no court inferior to that of a Court of Sessions shall try any offence punishable under section 138.]

On the other hand in the complaint case being Sadar CR Case No. 351 of 2017 from which the present Criminal Miscellaneous Case No. 51939 of 2019 arose for quashing the proceeding it appears that the power of attorney was duly produced and annexed at the time of filing of the case and the decision duly referred by the learned Advocate for the opposite party no. 1 being 56 DLR AD page 17 wherein their lordships held that a case under section 138 of the Negotiable Instruments Act, 1881 can be filed through power of attorney. Learned Advocate for the complainant opposite party no. 1 also relied upon the case of the Indian Jurisdiction reported in (2015) Supreme Court Cases 203 wherein Indian Supreme Court held that there is no bar to file case under section 138 of the Negotiable Instruments Act through attorney but their lordships in the said case

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opined that the attorney should have knowledge about the transaction of the case. However, now a days we find a lot of cases under section 138 of the Negotiable Instruments Act, 1881 being filed by power of attorney or through authorized person having authorization letter but in the averment of the complaint petition the learned Advocates of the complainants are not stating any single word in respect of power of attorney and due to ill drafting some sort of anomaly are being created while filing cases through power of attorney. In the premises we are inclined to give some observation in respect of filing of the cases through power of attorney and the observations are as follows:

1. The case under section 138 of the Negotiable Instruments Act, 1881 can be filed through the attorney of the cheque holder (payee or holder in due course) by executing power of attorney.
2. The power of attorney should be Special Power of Attorney "empowering the Attorney" only for filing case under Negotiable Instruments Act, 1881 regarding the dishonored cheque and details of the dishonored cheque, that is, cheque number and date must be mentioned in the power of attorney.

3. The executants of the power of attorney must have to state in the power of attorney that the attorney has the knowledge about the transaction of the cheque.
4. In the averment of the petition of complaint it must be stated that the case is being filed through constituted attorney.
5. The learned Magistrate of the Cognizance Court at the time of examination of the complainant attorney under section 200 of the Code must see whether the attorney has been given any power to file the case mentioning the cheque number. No Court shall proceed or no Magistrate shall take cognizance in a case under section 138 of the Negotiable Instruments Act if the number of the dishonored cheque is not mentioned in the power of attorney and the attorney is not authorized or empowered to file the case for the dishonored cheque.
6. The photocopy of the original power of attorney must be filed at the time of filing of the petition of complaint and the original should be exhibited at the time of adducing evidences.

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The above guidelines or observations shall not be governed in the case filed under section 138 of the Negotiable Instruments Act, 1881 by the bank or company.

Considering all the facts and circumstance we find substance in the submission of the learned Advocate for the petitioner in the Criminal Miscellaneous Case No. 51937 of 2019 arose out of Sessions Case No. 2150 of 2017 corresponding to Sadar CR. Case No.1596 of 2016.

We do not find any substance in Criminal Miscellaneous Case No. 51939 of 2019 arose out of Sessions Case No. 2147 of 2017 corresponding to Sadar CR. Case No. 351 of 2017.

In the result, the Rule issued in Criminal Miscellaneous Case No. 51937 of 2019 arising out of Sessions Case No. 2150 of 2017 is made absolute. The proceeding of the Sessions Case No. 2150 of 2017 arising out of Sadar CR. Case No. 1596 of 2016 pending in the Court of Metropolitan Joint Sessions Judge, 1st Court, Sylhet, is hereby quashed. The Rule issued in other Criminal Miscellaneous Case No. 51939 of 2019 seeking quashment of proceeding of Sessions Case No. 2147 of 2017 arising out of Sadar CR Case No. 351 of 2017 is discharged.

Learned Metropolitan Joint Sessions Judge, 1st Court, Sylhet, is hereby directed to proceed with the Sessions Case No. 2147 of 2017

arising out of Sadar CR Case No. 351 of 2017 pending before him and to dispose of the same expeditiously.

Communicate the judgment and order at once.

Md. Habibul Gani, J.

Md. Riaz Uddin Khan ,J:

I agree.

Md. Riaz Uddin Khan, J.



Memo No. Crl.....Dated...

Copy of the court's order dated 24.09.2020 forwarded to the

1. Metropolitan Joint Sessions Judge, 1st Court, Sylhet, for information and necessary action.
2. Chief Metropolitan Magistrate, Sylhet.


Hanif
13.03.2022




Superintendent

মোঃ তোজাম্মেল হক
সুপারিনটেনডেন্ট

By Order

(Md. Zakir Hossain Patwary)
Assistant Registrar
Phone-0222-3358584